

LFC Requester:**Julia Downs**

**AGENCY BILL ANALYSIS
2016 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

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{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original ☐ **Amendment** ☐
Correction ☐ **Substitute** ☒

Date 2/6/2016

Bill No: HSCAC/HJR20

Sponsor: William R. Rehm

Agency Code: 305

Short Denial of bail for Certain

Person Writing Greer Rose

Title: Felonies

Phone: 505-222-9034 **Email** grose@nmag.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: SJR1, HJR13, HJR 20
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

This joint resolution proposes an amendment to Article 2, Section 13 of the New Mexico Constitution to permit courts to deny bail to defendants under circumstances where they previously were not permitted to deny bail. The present, effective version of Article 2, Section 13 only permits district courts to deny bail to defendants charged with capital offenses or to deny bail temporarily (for 60 days) for repeat felons or for defendants accused of committing crimes using a deadly weapon.

This bill, like all the bills introduced this session dealing with bail, appears to be responsive to *State v. Brown*, 2014-NMSC-038, which held that a court could not set a bail based only on the severity of the charged offense. *Brown* also held that courts were not permitted to set an arbitrarily high bail as a means of incarcerating a defendant before trial.

BILL SUMMARY

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

Synopsis:

This joint resolution proposes the following changes to Article 2, Section 13:

Paragraph A: The constitutional guarantee against cruel and unusual punishment is moved to Paragraph A. HSCAC Substitute to HJR20 (substitute) also adds in the constitutional guarantee against excessive bail and excessive fines.

Paragraph B: Provides a presumption that all defendants, except those charged with a capital offenses or a violent first degree felony, are presumed to be eligible for release on reasonable bail. The court must find by clear and convincing evidence that no reasonable release conditions will protect the community. The substitute has changed the language in this paragraph from HJR20, to include any "violent first degree felony" with capital offenses.

Paragraph C: Is the same provision as Paragraph D in HJR20, but with some changes. The substitute provides that bail may be denied to individuals charged with a violent offense or sexual assault offense against another person. The court must find by probable case that there is a substantial likelihood that the defendant's release would cause great bodily harm to others. The substitute deletes the phrase "where the proof is evident and the presumption great" and changes the burden of proof from "clear and convincing evidence" to probable cause. The substitute essentially incorporates subsections (1) and (2) from paragraph D in the HJR20 into paragraph C.

Paragraph D: Is identical to paragraph E from HJR20, providing provides a constitutional basis

for the court to consider the seriousness of the charged offense, previous criminal record, and probability of the defendant appearing at the trial or hearing in the case when setting bail.

Paragraph E: Is identical to paragraph F from HJR20, providing that courts have the discretion to release a defendant on his or her own recognizance.

Paragraph F: Is an addition to HJR20, providing that bond may be set only once, if the defendant complies with all conditions of release. It further provides that a defendant can appeal his bond to a court of record and the prosecuting authority will then be required to present evidence justifying the amount of bail set. This appeal process shall be expedited and if the defendant is not found to have violated any conditions of release, and the bond is set at the same or lower amount as the original amount, it shall be deemed a continuation of the original bond.

Paragraph G: Provides that an appeal from an order denying bail shall be given priority over all other matters.

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SIGNIFICANT ISSUES

The most significant issue with this resolution is that the proposed version of Article 2, Section 13, does not provide a mechanism for denying bail to individuals who are a flight risk. Post *Brown*, there are concerns that the New Mexico Constitution has been interpreted to provide defendants with a constitutional right to a bail which he or she is able to afford. Thus, unless the constitution specifically provides a mechanism for denying bail to individuals deemed to be a flight risk, the concern becomes that a defendant could repeatedly fail to appear for hearings on the same case and always be entitled to a bail that the defendant could afford. In order to adequately address the state of pretrial release law post *Brown*, courts need to be empowered to deny bail upon a finding that no pretrial release conditions are adequate to secure a defendant's appearance at a trial or hearing in the present case. It is recommended that Paragraph C contain a third exception to the right to bail in circumstances where the court makes an appropriate finding that there are no pretrial release conditions adequate to secure the defendant's appearance at a trial or hearing in the present case.

Paragraph C incorporates HJR20 D(1) & (2) that provided exceptions to the general presumption that all defendants are entitled to reasonable bail by adding language to substitute paragraph C to include violent first degree offenses and sexual assault offenses with capital offenses. Other areas of New Mexico law do not generally categorize crimes as sexual assaults, preferring the term sexual offenses or sexual crimes. See e.g. NMSA 1978, § 30-9-1 *et sequence*, § 31-18-15(A)(5),(8), § 31-18-25, § 29-11A-3(I). It appears that there may be only one statutory reference for sexual assault which is located at NMSA 1978, § 30-1-15.

Paragraph B provides a "clear and convincing" standard for the court to deny bail for capital offenses and violent first degree offenses. Paragraph C provides a "probable cause" standard for the denial of bail for lesser degrees of felonies. The drafters may wish to consider a change from

“clear and convincing” to “probable cause” in paragraph B to mirror the language in paragraph C.

The other major change to HJR20 is Paragraph F. This paragraph, appears to greatly limit the courts discretion to eliminating the possibility that after a first bond is set, the court cannot raise or lower it without an appeal process to a court of record. This provision could arguably bind a District Court judge to the bail amount set by the Magistrate or Metropolitan Court judge. This process then contemplates an adversarial hearing that is essentially a mini-trial of the case on the merits before bail can be amended. Such a requirement would be uncommon among American jurisdictions. This would create a substantial burden on prosecutors and courts, especially in jurisdictions that levy charges via a grand jury rather than via a preliminary hearing. The language in paragraph F is also cumbersome and could lead to confusion during interpretation.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This bill conflicts with two other bills proposed this session, SJR1 and HJR13, which also proposed changes to Article 2, Section 13 of the New Mexico Constitution.

TECHNICAL ISSUES

The proposed version of Paragraph C appears to provide any court with the power to deny a defendant bail. Previously, this power was restricted to the district courts.

Paragraph F lacks clarification on when the original bond that cannot be modified is set. There should be clarification as to whether the intention is that the only bond set is at the probable case hearing by a Magistrate or Metropolitan court prior to indictment, or if it is post indictment by an arrainging District Court judge. Often times the information available to the courts at different stages of the case is vastly different, and binding the ability to adjust bond only upon a defendant motion could preclude the raising of bond when new information arises.

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The consequences of not enacting this joint resolution, or if the people of New Mexico do not adopt it, will mean that the current status quo will remain in effect. Presently, there are few circumstances in which courts are empowered to deny bond to criminal defendants, and, post *Brown*, there are significant questions about the constitutionality of courts setting any bonds that defendants are unable to meet.

AMENDMENTS